IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.19954 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? |
| 2 | To be referred to the Reporter or not ? |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ? |

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AARTI DYEING & PRINTING MILLS PVT. LTD.
Versus
UNION OF INDIA THR' SECRETARY & 2

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Appearance :
MR DHAVAL SHAH for MR PARESH M DAVE for Petitioner(s):1-2
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Learned advocate, Mr.Dhaval Shah, seeks permission to amend the prayer clause. Permission granted. Amendment to be carried out immediately.

2. Heard Mr.Dhaval Shah, learned advocate for the petitioners, and Mr.Jitendra Malkan, for the respondents .

3. RULE. Mr.Malkan waives service of rule on behalf of the respondents. As the controversy involved in the present petition lies in a very narrow compass the same is taken for final hearing and disposal.

4. This petition challenges the Order No.M/238/WZB/2005/C-III, S/351/WZB/2005/C-III, A/523/WZB/2005/C-III dated 27.04.2005 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Regional Bench at Mumbai (CESTAT) as well as the Order-in-Appeal No.YPP/229/SRT/2003 dated 13th February, 2003 passed by the Commissioner (Appeals), Central Excise & Customs, Surat-1 in Appeal F.No.V-2(54)169/SRT-I/DIV-II/2002.

5. By an order dated 7th August, 2002, passed by the Joint Commissioner, Central Excise & Customs, a demand of Rs.3,00,000/- had been confirmed against the petitioners and an equal amount of penalty had been imposed. The petitioners carried the matter in appeal before the Commissioner (Appeals), Surat who by a common order dated 13th February, 2003 passed in five appeals, including the one filed by the petitioners, dismissed the appeals.

6. It is the case of the petitioners that around first week of March, 2003 the aforesaid Order-in-Appeal was received by one Shri Ajit Shah, Cost Accountant, working with the petitioners and looking after accounts as well as excise work. That Shri Shah was terminally ill and on account of his ill-health was not in a position to attend his work regularly, and ultimately, he expired in the second week of August, 2003. It is the case of the petitioners that they were not aware of the aforesaid Order-in-Appeal as Shri Shah had not informed the management of the petitioner-company about the same and hence, could not prefer appeal before CESTAT within the stipulated time limit. By a communication dated 21st June, 2004 the Range Superintendent called upon the petitioners to deposit amount of duty and penalty pursuant to the aforesaid Order-in-Appeal. By communications dated 6th July, 2004 and 26th July, 2004, reminders were issued by the Superintendent calling upon the petitioners to make the above payments.

7. It is the case of the petitioners that on the basis of the above communications issued by the Range Superintendent, the petitioners came to know about the Order-in-Appeal passed by the Commissioner (Appeals). That, therefore, on 7th August, 2004, the petitioners preferred an appeal

challenging the same before CESTAT, Mumbai together with an application for condonation of delay as well as application for stay. That by the impugned order dated 27th April, 2005, CESTAT declined to condone the delay of 455 days and dismissed the application, stay application as well as the appeal.

8. When the matter came up for hearing at the notice stage, this Court was not satisfied with the reasons stated for the delay in preferring the appeal before CESTAT. On behalf of the petitioners, time was sought to place on record a further explanation explaining the delay in preferring the appeal. Accordingly, by a further affidavit dated 14th October, 2005 the petitioners stated various reasons for the delay caused in filing the appeal. One of the grounds stated in the further affidavit reads as follows:

> "1. It is respectfully submitted that there was no willful default on part of the petitioners in not appearing before the Commissioner (Appeals) who has passed OIA No.YPP/229 to 233/SRT/2003 thereby disposing of 5 appeals of 4 appellants including the petitioner company. We have never received any notice of personal hearing from the office of the Commissioner (Appeals) for the appeal in question, and we have learnt on enquiry with all

other appellants whose appeals were also disposed of by the above common order that none of them has also received any hearing notice of their appeals from the office of the Commissioner (Appeals) in this regard. We have also caused enquiries with the office of the Commissioner (Appeals), Surat and we have come to know that none of these 4 appellants including the petitioners herein was served with the hearing notice and none of these appellants knew when the appeals were fixed for personal hearing, and there is also no evidence in the file of this case in the office of the Commissioner (Appeals) showing that any of these appellants including the petitioner company was served with any hearing notice. Thus, it is clear that why none of the 4 appellants appeared before the Commissioner (Appeals) and why all the 5 appeals of these 4 appellants have been decided ex-parte by the Commissioner (Appeals) vide the above common order.

It is therefore, respectfully submitted that the order of the Commissioner (Appeals) has been made in violation of principles of natural justice and there has not been any deliberate lapse or negligence of petitioners' part in not appearing before the Commissioner (Appeals) in this case."

9. On 17th October, 2005 notice was issued in the matter. In response to the notice, the respondents have put in

appearance and have filed two affidavits-in-reply dated 28th November, 2005 and 18th January, 2006. However, the contention of the petitioners that notice of hearing in relation to the appeal before the Commissioner (Appeals) had not been served upon the petitioners had not been dealt with. Hence, the learned counsel for the respondents, was directed to obtain instructions in that regard.

10. Today, Mr. Malkan has placed on record a communication dated 23rd February, 2006 addressed to him by the Assistant Commissioner, Central Excise & Customs Division-II, Surat-1, wherein it is stated that upon verification from the office records acknowledgment of personal hearing letter dated 20th January, 2003 is not available. Therefore, it is apparent that the respondents are not in a position to controvert the specific contention raised by the petitioners that the Order-in-Appeal has been passed without affording an opportunity of hearing to them.

11. In the light of the aforesaid factual position, it is not necessary to enter into any further discussion as regards the merits of the order passed by CESTAT. The Order-in-Appeal issued on 13th February, 2003 passed by the Commissioner (Appeals) having been passed in violation of the principles of

natural justice, stands vitiated on that count alone. In the circumstances, restoring the matter to CESTAT would not serve any fruitful purpose. The Order-in-Appeal itself is required to be set aside on the ground of breach of principles of natural justice, and the matter is required to be restored to file of the Commissioner (Appeals) for deciding the same afresh after affording the petitioners an adequate opportunity of hearing.

12. In the circumstances, the impugned Order-in-Appeal No.YPP/229/SRT/2003 dated 13th February, 2003 is hereby quashed and set aside. Appeal F.No.V-2(54)169/SRT-I/DIV-II/2002 is restored to the file of the Commissioner (Appeals). The Commissioner (Appeals) shall give an opportunity of hearing to the petitioners and pass a fresh order thereon.

13. In the aforesaid facts and circumstances, the impugned order No.M/238/WZB/2005/C-III, S/351/WZB/2005/C-III, A/523/WZB/ 2005/C-III dated 27.04.2005 of the Tribunal will not survive. Hence, the same is also quashed and set aside.

14. In the result, the petition is allowed. Rule is made absolute, accordingly, with no order as to costs.

Sd/-

[ D.A. MEHTA, J ]

Sd/-
[ H.N. DEVANI, J ]

*Bhavesh**